

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Pennsylvania American Water Co.,

Employer,

and

Case No. 06-RC-218209

Utility Workers United Association, Local 537,

Petitioner,

and

Utility Workers Union of America, AFL-CIO, CLC,
and its Local 537,

Intervenor.

INTERVENOR'S REQUEST FOR REVIEW

Comes now the Intervenor, Utility Workers Union of America, AFL-CIO, CLC, and its Local 537 ("Local 537"), by and through undersigned counsel, and, pursuant to Section 102.67 of the Board's Rules and Regulations, 29 CFR § 102.67, requests review of Regional Director Nancy Wilson's November 8, 2018 Amended Decision and Direction of Election (hereinafter, "Dec.") in the above-captioned matter.

STATEMENT OF THE CASE

A. The Issue On Which Review Is Sought

In its Amended Decision and Direction of Election, the Regional Director rejected the Employer's and the Intervenor's argument that the Petitioner's RC petition should be dismissed on contract bar grounds. In doing so, the Regional Director rigidly applied the Board's "bright-line rule" that extrinsic evidence, no matter how compelling and undisputed, may *never* be introduced to show that the collective bargaining agreement claimed to stand as a contract bar

was in fact agreed to in full by the incumbent union and the employer. As we demonstrate below, there are compelling reasons for the Board to revisit the “bright-line rule” applied by the Regional Director and recognize a limited equitable exception to that rule covering the sui generis factual circumstances presented here.

B. The Sui Generis Factual Circumstances Presented

The employees at issue in this case work for Pennsylvania American Water Co. (“American Water”) at 11 separate facilities located outside the greater Pittsburgh, Pennsylvania metropolitan area. Historically, these employees have been covered under a single collective bargaining agreement (“the Outside Districts Agreement”) between American Water and the incumbent union, UWUA Local 537. See Dec. at 1-2.

The negotiations leading to the most recent Outside Districts Agreement claimed to stand as a contract bar in this case took place from “around” October 3, 2017 to February 23, 2018, and were led by a senior company official Robert Burton on the American Water side and by then-President Kevin Booth on the UWUA Local 537 side. See Dec. at 3. And, as aptly described by the Regional Director in her Decision, the process followed in those negotiations was “unique”:

The parties worked together to create an electronic working copy of the proposed agreement that utilized red-line edits and tracked changes. As the parties discussed proposals that were exchanged, they input those changes in the red-lined document. At hearing, Burton testified that the initials “KB” on the working copy of the contract referred to comments or changes made by [UWUA Local 537] through Kevin Booth, and the initials “AWW” referred to comments or changes made by [American Water]. When the parties reached agreement on an issue, the proposing party would electronically add the comment, “tentative agreement” or “agreed,” along with a date. In turn, the other party would comment “agreed.”

See id. (footnote omitted).

At the hearing, American Water introduced as Exhibit 1 a copy of the parties' red-lined document as it stood upon the completion of the negotiations on February 23, 2018, and that red-lined document is cited in the Regional Director's decision as "ER Exh. 1." By our calculations, there are 47 instances in which one of the parties electronically made a comment such as "tentative agreement" or "agreed," and the other party then indicated its assent by electronically responding "agreed" or "okay."¹ But the Regional Director accurately identified 12 instances in which an American Water representative electronically made the comment "tentative agreement" or "agreed," and Kevin Booth made no electronic response. See Dec. at 3 & n.15. In 7 of these 12 instances, the American Water comment that Booth failed to respond to was made at the very end of the bargaining process on February 22 or 23, and was addressed to a substantive issue (e.g., wage rates) still remaining to be settled in the negotiations.² The other 5 instances involved one seemingly minor substantive change and four non-substantive, formatting changes proposed by American Water at the very outset of the bargaining process on October 11, 2017.³

As the Regional Director acknowledges in her decision, American Water's lead negotiator Robert Burton testified at the hearing that "[o]n February 23, 2018, the parties verbally agreed that they had reached a tentative agreement" based on "[t]he red-lined document that existed at that time." See Dec. at 3; see also Hearing Tr. ("Tr.") at 29 (Burton testimony setting out the facts surrounding the parties' verbal agreement, including that the verbal

¹ See ER Exh. 1 at pp. 1 (three items), 2 (two items), 3, 7, 8 (two items), 9, 11, 12, 17 (two items), 18, 19, 20 (two items), 21, 22, 24, 25, 26, 29, 32, 36, 37, 44 (two items), 48 (two items), 49 (five items), 50, 51 (two items), 53, 54 (three items), 55, 57, 58, 61.

² See ER Exh. 1, at pp. 27 (AWW49); 30 (AWW55); 50 (AWW86); 53 (AWW97); 55 (AWW 110); 58 (AWW 112 and AWW 115).

³ See ER Exh. 1, at pp. 30 (AWW54); 52 (AWW93 and AWW96); 55 (AWW107 and AWW111).

agreement took place at an in-person meeting on February 23 and was followed up by congratulations and handshakes). Moreover, Burton's testimony respecting this verbal agreement was corroborated by text messages sent from Booth to Burton immediately after their in-person meeting on February 23. See Tr. at 30-32 & Employer Exh. 3.

As the Regional Director also acknowledges in her decision, American Water's lead negotiator Robert Burton further testified that "[o]n March 17, 2018, the membership voted to ratify the red-lined document presented to them by [Booth]." See Dec. at 3; see also Tr. at 32-33. Moreover, just as Booth confirmed the parties' February 23 verbal agreement by text message to Burton, Booth did the same with respect to the March 17 ratification vote. See id. & Employer Exh. 4.

Importantly, Booth did not make an appearance at the hearing, much less offer any testimony aimed at rebutting Burton's testimony respecting Booth's actions in the foregoing two respects. Burton's testimony respecting Booth's actions thus stands entirely unrefuted on the record before the Board.

Almost immediately on the heels of the March 17 ratification vote, "two significant events occurred," Dec. at 4, albeit in the reverse temporal order implied by the Regional Director. First, the National Union placed UWUA Local 537 under trusteeship. Second, Booth wrote a letter to American Water "declar[ing] that the membership of the Local [had] voted to disaffiliate from the [National Union] and become members of the [newly-formed] Petitioner [union]." Booth—the leading proponent of the purported disaffiliation and the founder of the newly-formed Petitioner union—was removed from his UWUA Local 537 office pursuant to the trusteeship, and later preliminarily enjoined from, inter alia, holding the Petitioner union out as the lawful collective bargaining representative of the UWUA Local 537 membership. Id.

C. The Regional Director’s “No Contract Bar” Ruling

In rejecting the existence of a contract bar, the Regional Director “assum[ed]” without deciding that, under the Board’s precedents, a contract bar unquestionably would have arisen in this case if Kevin Booth had initialed, “okayed” or otherwise manifested his assent in writing to each of the nearly 60 statements made by American Water in the parties’ red-lined document that the parties had reached a “tentative agreement” or “agreement” on an issue. See Dec. at 6. But the Regional Director went on to find that “the fatal flaw” in the Employer’s and Intervenor’s contract bar argument was that there were “a dozen” instances in the parties’ red-lined document where Booth had failed to take this step. See id. at 7; see also id. at 6 (“Here, the parties’ written document does not bar the election because it was not *sufficiently* complete”) (emphasis added); id. (“[T]he face of that document does not reflect a *complete* agreement from *both* parties. . . . Indeed, there are no fewer than twelve comments from the Employer referring to a ‘tentative agreement on various dates without a subsequent comment from [Booth] indicating ‘agreed’ or ‘okay’”) (first emphasis added; second emphasis in original) (footnote omitted).

The Regional Director rejected the Employer’s and the Intervenor’s retort that Booth had clearly manifested his assent to *all* of the “tentative agreements” in the parties’ red-lined document (i) by communicating to Burton on February 23, 2018 that the parties had reached a tentative agreement based on that red-lined document, and (ii) by then presenting that agreed-upon red-lined document to the membership on March 17, 2018 for ratification. In doing so, the Regional Director relied entirely on the Board’s “bright-line rule” that these two facts constituting “extrinsic evidence” were “immaterial” to the contract bar inquiry. See Dec. at 5-7.

ARGUMENT

The Regional Director was correct in “assuming” that, under the Board’s precedents, a contract bar unquestionably would have arisen in this case if Kevin Booth had initialed, “okayed” or otherwise manifested his assent in writing to each of the nearly 60 statements made by American Water in the parties’ red-lined document that the parties had reached a “tentative agreement” or “agreement” on an issue. Under those Board precedents, the document claimed to stand as a contract bar need not be a “formal” collective bargaining agreement. Rather, the touchstone is whether that document, be it “formal or informal,” contains sufficient manifestations of the parties’ agreement on all of the terms of a new contract as to “leave no doubt” that the parties have in fact reached a “full agreement” on those terms. See e.g. Seton Medical Center, 317 NLRB 87, 87 (1995). Thus, under those Board precedents, the only potential obstacle to the finding of a contract bar in this case is Booth’s failure to sign off in writing on 12 (out of nearly 60) statements made by American Water in the parties’ red-lined document that the parties had reached a “tentative agreement” or “agreement” on an issue.

Concededly, the Regional Director was likewise correct in ruling that the Board’s precedents establish a bright-line rule that extrinsic evidence is inadmissible to show that the parties have in fact reached a full agreement on the terms of a new contract. See e.g. Seton Medical Center, 317 NLRB at 88. The question presented by this Request for Review, then, is whether there are compelling reasons for the Board to revisit this bright-line rule and recognize a limited equitable exception to that rule covering the sui generis factual circumstances presented here. For the reasons set out below, the answer to this question is “yes.”

The two items of extrinsic evidence at issue here are: (i) Burton’s testimony, backed up by documentary evidence in the form of text messages from Booth, that on February 23, 2018,

the parties verbally agreed that they had reached a tentative agreement based on the parties' red-lined document; and (ii) Burton's testimony, also backed up by documentary evidence in the form of text messages from Booth, that on March 17, 2018, the membership voted to ratify the red-lined document presented to them by Booth. Supra pp. 3-4. There are a number of compelling reasons to permit the introduction of this extrinsic evidence to prove up a contract bar in the factual circumstances presented.

First, this extrinsic evidence, taken as true, "leaves no doubt," Seton Medical Center, 317 NLRB at 87, that—prior to the filing of the instant petition on April 10, 2018—the parties had reached a "full agreement," id., on the terms of a new contract *as embodied in their red-lined document*, notwithstanding Booth's failure to sign off in writing on each and every term set out in that red-lined document. That is so because by verbally agreeing on February 23, 2018 that the parties had reached a tentative agreement based on that red-lined document, and by then presenting that agreed-upon red-lined document to the membership on March 17, 2018 for ratification, Booth undeniably manifested his assent to *all* of the terms in that red-lined document, including those relatively small number of terms he did not sign off on in writing.⁴

⁴ Given that Booth did not testify at the hearing, it is unclear why Booth did not sign off in writing on each and every term set out in the red-lined document. But the red-lined document itself offers some clues. In 7 of the 12 instances in which Booth failed to do so, the term was a substantive one (e.g., wage rates) agreed to at the very end of the bargaining process on February 22 or 23. Supra p. 3. As to these 7 substantive terms agreed to at the proverbial "eleventh hour," Booth may well have concluded, if he thought about the matter at all, that his verbal agreement with Burton on February 23 that the parties had reached an overall agreement based on the red-lined document eliminated the need for him to go back into that document to sign off on these 7 agreements. The other 5 instances involved one seemingly minor substantive change and four non-substantive, formatting changes proposed by American Water at the very outset of the bargaining process on October 11, 2017, id.; instances that Booth could easily have overlooked in the press of the overall negotiations on a myriad of issues. In any event, whatever the reasons behind Booth's failure, it is abundantly clear from Booth's actions on February 23 and March 17 that he was in agreement with *all* of the terms set out in the parties' red-lined document.

Second, this extrinsic evidence has an unusually high degree of reliability under the circumstances presented, and thus should be taken as true. To begin with, Burton's testimony respecting Booth's actions on February 23, 2018 and March 17, 2018 is both uncontradicted by any other witness *and* backed up by documentary evidence in the form of text messages from Booth himself. Equally to the point, given that Booth is the founder of the Petitioner union with a keen interest in growing Petitioner's membership by averting a contract bar finding in this case, Booth had every incentive to appear as a witness for Petitioner to correct any possible inaccuracy in Burton's testimony respecting Booth's actions on February 23, 2018 and March 17, 2018 (actions taken, of course, when Booth was still the President of UWUA Local 537). Against this backdrop, Booth's failure to appear as a witness for Petitioner (indeed, to appear at the hearing at all, thereby subjecting himself to being called as a witness by an adverse party) speaks volumes.

Third, for the Board to turn a blind eye to this highly probative and highly reliable extrinsic evidence under the circumstances presented would be to confer a windfall on Booth based on a failure that lies entirely at Booth's own feet. To be more precise, it would reward Booth for his own misstep in failing to sign off in writing on all of the terms of the bargaining parties' red-lined document by opening the door to an RC petition by the rival union (i.e., the Petitioner union) that Booth himself formed shortly on the heels of that failure. Basic principles of equity and fairness argue strongly against conferring such a windfall on Booth (and, by extension, on the Petitioner union that Booth founded).

Against all this, there are no countervailing reasons that we can discern for formalistic adherence in this case to the Board's bright-line rule against the use of extrinsic evidence to show that an incumbent union and an employer have in fact reached a full agreement on the terms of a new contract prior to the filing of an RC petition by a rival union. In the Seton

Medical Center case relied on most heavily by the Regional Director, the Board gave three reasons for adhering to such a bright-line rule, none of which are apposite on the particular facts of this case.

First, the Board expressed a concern that allowing extrinsic evidence on “the entire question” of whether the bargaining parties had “reached agreement on all matters” might open the door to a major piece of contested litigation on that point, with the attendant risk of “substantial delays in resolving employees’ representational interests.” See Seton Medical Center, 317 NLRB at 88. But this concern is not implicated here, inasmuch as the Burton testimony and supporting documentary evidence conclusively establishing that the bargaining parties did in fact “reach[] agreement on all matters” is easily digested evidence that stands entirely unrefuted.

Second, the Board expressed a concern that allowing extrinsic evidence on such a question “might in some instance invite collusion by incumbent unions and employers,” see id., but this concern is not implicated here either. Although the Board did not spell out the nature of this concern in its Seton Medical Center decision, the Board presumably was alluding to the risk that incumbent union representatives and employer representatives with direct personal knowledge of what transpired during the course of the parties’ negotiations might conspire to tell a false tale of the relevant events that, if accepted as true, would serve to defeat a rival union’s RC petition on contract bar grounds.⁵ But in this case, the incumbent union (UWUA Local 537) was placed in trusteeship after the relevant bargaining events took place, and is now being run by

⁵ In the usual scenario where representatives of the rival union seeking to displace the incumbent union had no involvement themselves in the underlying negotiations, this risk of collusion would indeed loom large, inasmuch as the rival union would likely have no ability to impeach any false tale of those negotiations concocted by representatives of the incumbent union and the employer. But of course, we are not dealing with that usual scenario here.

National Union personnel who have no direct personal knowledge of what transpired during the course of the parties' pre-trusteeship negotiations, so there is zero risk that the incumbent union and the employer could pull off such a ruse to the rival Petitioner union's detriment.

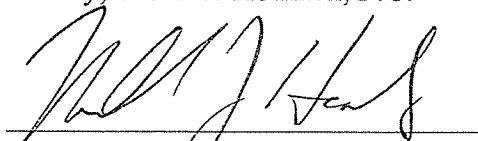
Third, the Board reasoned that there is no injustice involved in holding the incumbent union and the employer to "the relatively minor requirement" that they both sign off in writing on a document reflecting the fact "that they have reached accord on a total contract." See 317 NLRB at 88. But as we have shown, however compelling this reasoning may be in virtually all settings, it is not compelling at all in the present setting. At the risk of belaboring the point, in the present setting, it was not the current representatives of the incumbent union who failed to take the steps necessary to adhere to this "relatively minor requirement." Rather, it was Kevin Booth—the subsequently-removed President of the incumbent union and the founder of the Petitioner union seeking to displace the incumbent union—who was solely at fault in this regard. In these highly unusual circumstances, it would be unjust in the extreme to allow Booth to profit from his own misstep at the incumbent union's expense by turning a blind eye to extrinsic evidence conclusively establishing that, prior to the April 10, 2018 filing of the instant petition by Booth's new rival union, the incumbent union and the employer did in fact "reach[] accord on a total contract."

CONCLUSION

For the foregoing reasons, the Board should grant this Request for Review, set aside the Regional Director's Amended Decision and Direction of Election, and remand the matter with instructions to dismiss the instant petition on contract bar grounds. The Intervenor also requests that the election be postponed until this Request for Review is considered by the Board or, in the alternative, that the ballots be impounded.

Respectfully submitted,

Healey, Block & Hornack, P.C.

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Michael J. Healey

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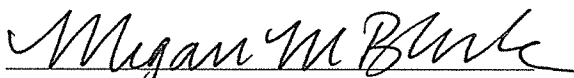
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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that a true and correct copy of the foregoing was served by email and first class mail on November 13, 2018 upon:

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